APPENDIX A

92-5368

UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT COURT

FILED MAY 4 1993
LEONARD GREEN, Clerk

WILLIAM MINEER
Plaintiff-Appellee

V.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

JEWELL CALL, FLEMING COUNTY JUDGE/ EXECUTIVE; MAGISTRATE GARY C. HARMON; MAGISTRATE ANDY COLE; MAGISTRATE RONNIE CARPENTER; MAGISTRATE WILLIAM THOMPSON; MAGISTRATE L.C. CORD. in Their Individual Capacities,

Defendants-Appellants

JEWELL CALL, FLEMING COUNTY JUDGE/ EXECUTIVE; MAGISTRATE GARY C. HARMON; MAGISTRATE ANDY COLE; MAGISTRATE RONNIE CARPENTER; MAGISTRATE WILLIAM THOMPSON; MAGISTRATE L.C. CORD. in Their Official Capacities, FLEMING COUNTY FISCAL COURT; FLEMINSBURG, KENTUCKY,

Defendants.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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Before: GUY and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

JAMES P. CHURCHILL, Senior District Judge, delivered the opinion of the Court. GUY, circuit judge, delivered a separate opinion, concurring in part and dissenting in part, in which RYAN, circuit judge, concurred.

William Mineer was employed by Fleming County, Kentucky, as road supervisor from 1978 until January 8, 1990 when his employment was effectively terminated by actions of the Fleming County Judge/Executive *and/or* the Fleming County Fiscal Court.

Mineer commenced this lawsuit in the United States District Court for the Eastern District of Kentucky for injunctive relief and damages for constitutional violations pursuant to 42 U.S.C. § 1983. His complaint also includes state law claims.

The defendants are Fleming County, the Fleming County Fiscal Court, Jewell Call as Fleming County Judge/Executive in his individual and official capacities, and six named fiscal court magistrates. All of the magistrates are sued in their official capacities as members of the fiscal court. All of them except one, John Sims, are also sued in their individual capacities.

It is Mineer's position that the term of his employment was for four years from the second Tuesday of

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* Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

January 1988, and that the termination of his employment without a predeprivation hearing in the middle of his term denied him procedural due process under the Fourteenth Amendment. He further asserts that the actions of the defendants were in retaliation for his political activity in violation of the First Amendment.[1]

The plaintiff's state law claims are for violation of Ky. Rev. Stat. Ann. ("K.R.S.") §§ 179.020 and 179.060.

From their briefs, it appears that the defendants denied the plaintiff's allegations generally and that the individual defendants also pleaded the affirmative defense of qualified immunity with respect to the federal claims.

Following the close of discovery, the defendants filed a motion for summary judgment as to all claims. Call and the five magistrates who were sued in their individual capacities also sought summary judgment on the qualified immunity issue.

The District Court granted the magistrates' motion as to "Plaintiff's claims based on his First Amendment and State Law claims for wrongful discharge." In all other respects, the defendants' motion for summary judgment was denied.

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[1] The plaintiff also claims that his termination violated the Fifth Amendment, but he does not explain how the Fifth Amendment was implicated.

Call and all six magistrates[2] filed a notice of appeal in their individual capacities from the order denying their motion for summary judgment on the issue of qualified immunity. The individual defendants appeal denial of the summary judgment motion for qualified immunity as a matter of right. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The appellants have asked the Court to exercise pendent appellate jurisdiction with respect to other state and federal issues. We decline to do so although we realize that our decision on the qualified immunity issue will impact other issues.

The Relevant Statutes

Kentucky statutes concerning county road supervisors and county judge/executives are central to the issues on appeal.

The position of County Road Supervisor is created by statute, K.R.S. § 179.020.

The statute directs that if the fiscal court does not provide for a county road engineer, the duties of the county road engineer shall be performed by a county road supervisor who shall be employed by the county

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[2] It is not clear why magistrate John Sims filed a notice of appeal from the order denying qualified immunity. Because he was not sued in his individual capacity, the defense of qualified immunity was not available to him.

judge/executive with the consent of the fiscal court. In order to qualify for the position as a county road supervisor, the candidate must meet the following requirements:

> (a) He has at least three (3) years' practical road building experience of a nature satisfactory to examining authorities selected by the bureau of highways for the Commonwealth of Kentucky, and
>
> (b) He has passed an examination, either oral or written, or both, given by the examining authorities, and has received a certificate of qualification from the authorities.

The statute also provides that the period of employment for any county road supervisor shall be two (2) or four (4) years, in the discretion of the fiscal court, beginning with the second Tuesday in January of an even-numbered year.

The statute also provides that a county road supervisor "may be removed in the same manner provided for county road engineers."

K.R.S. § 179.060, entitled "Removal of engineer — Filling of Vacancy," reads in its entirety as follows:

> (1) The county judge/executive may remove the county engineer, appointed under KRS 179.020, at any time for incompetency, malfeasance or misfeasance in office upon written charges after a hearing of which ten (10) days' notice shall be given by serving a copy of the charges upon the county engineer. The hearing shall be at the courthouse, in the county seat.

(2) If upon the hearing the charges are sustained, the county judge/executive shall remove the county engineer and immediately notify him by mail of his removal. The notice shall state specifically the grounds for removal. The record of the proceedings shall be filed in the office of the county clerk.

(3) Within ten (10) days after the removal, the county judge/executive, with the consent of the fiscal court, shall appoint a county engineer to fill the vacancy caused by the removal. The person so appointed shall hold office for the unexpired term or until a final order of a court of competent jurisdiction determines that the original county engineer was wrongfully and illegally removed and directs his reinstatement.

K.R.S. § 67.710 provides that the county judge/executive shall be the chief executive of the county. The statute provides that his responsibilities shall include "exercis[ing] with the approval of the fiscal court the authority to appoint, supervise, suspend, and remove county personnel (unless otherwise provided by state law)."

Facts Concerning Mineer's Employment

Prior to the second Tuesday of January 1988, Mineer had completed successive four and two year terms. In January 1988, the county judge/executive submitted Mineer's name for another term, but the nomination was disapproved by the fiscal court. He stayed on as de facto county road supervisor until August of 1989 when County Judge/Executive Owens again submitted Mineer's name to the fiscal court.

The minutes of a regular meeting of the fiscal court held on August 14, 1989 contain the following entry:

> Motion by John, seconded by Ernie, to hire Bill Mineer as Co. Rd. Supervisor for 4 years, retroactive to 2nd Tues. of 1988, whereby the Court failed to hire him in Jan. of 1988, and whereas it was reviewed and brought to the Court's attention, and pursuant to K.R.S. 179-020, hereby being resolved by the above hiring action.

Magistrate Cord testified that the county attorney was at the meeting and told the fiscal court that Mineer's term would be two years because one court could not bind the next.

Facts and Allegations Concerning Termination of Mineer's Employment

The parties and the District Court all assume that Mineer lost his employment on January 8, 1990 so we proceed on the same assumption. The record on appeal leaves something to be desired concerning Judge Call's role in the termination.

Mineer's complaint contains the general allegation that he was wrongfully discharged "by the actions of the *defendants* herein in their official and individual capacity [sic] on or about the 8th day of January, 1990." (emphasis added.)

The appellants' brief contains three different versions of the event. One version is that the term of Mineer's employment expired as a matter of law on the second Tuesday of January 1990 because one fiscal

court could not bind the next. Under this version he was not fired. He just was not rehired. Another version is that the fiscal court voted to rescind his four year contract and thereafter Judge Call decided to nominate his own appointee. The third version espoused in the brief is that the court decided not to ratify his contract.

The January 8, 1990 minutes of the fiscal court contain the following reference to Mineer:

> Motion by John Sims, second by L.C. Cord, Jr., to go into Executive Session to discuss personnel.
>
> Vote Unam.
>
> Court came out of Exec. Session
>
> Motion by Bill Thompson, seconded by Andy Cole, to nullify present Contract with Rd. Supervisor Bill Mineer, (entered into 8-14-89 for 4 years), as this Court doesn't feel bound by previous Court's motion of a Contract past their [sic] term, thereby creating a vacancy at the end of 1-8-90 workday.
>
> Yes: Ronnie, Garey and L.C.
>
> Nay: John
>
> Motion Carried.

The minutes disclose that "Bill" and "Andy" were at the meeting, but they apparently did not vote on this resolution. The motion was treated as carried although it had the affirmative vote of only three magistrates in a meeting attended by six magistrates and presided over by the county judge/executive.

The minutes show that the next item of business was Judge Call's recommendation that Bill Gulley fill

the vacancy on a temporary basis. Lacking support, Call withdrew the recommendation. The fiscal court then unanimously accepted Judge Call's recommendation that James Watkins be appointed to fill the vacancy on a temporary basis.

Judge Call has testified that he did not fire Mineer; he just did not hire him.

Judge Call presided at the meeting.

There is no direct evidence that Judge Call asked the fiscal court to take any action on January 8, 1990 concerning the county road supervisor position. There is unrefuted evidence, however, that before Call took office on January 2, 1990 he intended to appoint someone other than Mineer and that between January 2, 1990 and January 8, 1990, Call informed Mineer that he intended to let Mineer go if he could do so.

From this record, it is clear that if Mineer was discharged on January 8, 1990 he was discharged by Judge Call. Whether he was lawfully discharged or not, his ability to perform his duties was taken from him on January 8, 1990 with the approval of three magistrates and with no action to prevent it by the county judge/executive and the two other magistrates.

The District Court's Rationale

In ruling in favor of the magistrate defendants' motion for summary judgment on Mineer's First Amendment and state law claims and in denying the motions for summary judgment on the Fourth Amendment due

process claims, the District Court relied on *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

The *Christian* court approved a ruling by the district court that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration and that it was necessary to reappoint the county flood administrator. The court further ruled that, under the circumstances of that case, the failure to do so constituted a constructive discharge. The court also ruled that the fiscal court magistrates were entitled to summary judgment on the First Amendment claims because the magistrates had no appointment authority. The court nevertheless reversed a district court grant of summary judgment on Christian's Fourteenth Amendment due process claim.

Christian is similar to this case in some respects, but is distinguishable in others. In *Christian*, the plaintiff was a county flood plain administrator whose appointment and removal was governed by K.R.S. § 67.710 rather than a county road supervisor whose appointment and removal was governed by K.R.S. §§ 179.020 179.060. Upon learning that he would not be reappointed by a newly elected county judge/executive, Christian sent a letter to the judge and fiscal court requesting a hearing, which request was denied. Here, Mineer never requested a hearing.

There is one other distinction between *Christian* and this case on appeal. Here the Court is directly concerned with qualified immunity only.

The Magistrates' Claim of Qualified Immunity

The general provisions concerning powers and responsibilities of county chief executive are set forth in K.R.S. § 67.710. They apply to the appointment and removal of county personnel except as otherwise provided by law. The law with respect to the appointment and removal of county road supervisors is "otherwise provided" in K.R.S. §§ 179.020 and 179.060

The powers and authority of county judge/executives and fiscal courts with respect to the appointment and removal of county road supervisors are spelled out in Kentucky statutes in a manner relatively free from ambiguity.

The fiscal court has a limited discretion to determine the term of employment of a county road supervisor. The term can be for two years or for four years and must always expire on the second Tuesday of an even numbered year.

The county judge/executive appoints county road supervisors. The appointment of a county road supervisor must have the consent of the fiscal court.

During a county road supervisor's terms, he can be removed for cause and only for cause. Cause for removal includes incompetency, malfeasance or misfeasance in office.

Only the county judge/executive has the authority to remove a county road supervisor. To lawfully remove a county road supervisor, the county judge/executive must follow a carefully specified procedure which in-

cludes written charges and a hearing at the courthouse after ten days' written notice. K.R.S. § 179.060(1).

If, and only if, the charges are sustained at the hearing, may a county judge/executive remove the county road supervisor.

It is a reasonable construction of the statute that the fiscal court would not be involved in the removal hearing.[3]

It is also reasonable to construe § 179.060 concerning the conditional appointment of a successor as applying to county road supervisors as well as to county engineers.

Applying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination.

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[3] An annotation to K.R.S. § 179.060 contains the following entry:

> KRS 179.060 provides, in effect, pursuant to subsection (2) of this section, that the county judge/executive can remove a county road supervisor, without the consent of the fiscal court. However, it can be said that KRS 67.710(7) amended KRS 179.060 by implication, and KRS 67.710(7) requires the county judge/executive to exercise his authority to remove county personnel with the approval of the fiscal court. OAG 84-205.

Since the county judge/executive did not initiate the removal procedures spelled out by K.R.S. § 179.060 we need not determine whether the statutory hearing would be conducted by the fiscal court or by the county judge/executive.

The sole power of removal was vested in the county's chief executive office. As a matter of law, it is doubtful that the fiscal court would have played a role had Judge Call followed the statute in removing Mineer. Call did not initiate removal proceedings. The fiscal court had no authority to conduct a hearing.

We, therefore, conclude that the magistrates' motion for summary judgment on qualified immunity should have been granted with respect to the Fourteenth Amendment procedural due process claim as well as with respect to the First Amendment claim.

The County Judge/Executive's Claim of Qualified Immunity

As a matter of law, it was County Judge/Executive Call who had the authority to initiate proceedings to remove Mineer from his employment. As a matter of law, the fact that Mineer was effectively fired was Call's responsibility.

On the record before the Court there are fact questions concerning Call's motives for terminating Mineer's employment. Call may have terminated Mineer in retaliation for political activity. He may have terminated him for incompetence. These fact questions, however, are irrelevant if Call had qualified immunity for his conduct, and they are likewise irrelevant in resolving the issue of qualified immunity.

The relevant inquiry focuses on whether a reasonable official in the defendant's position could have be-

lieved his conduct did not violate clearly established statutory or constitutional rights. In determining whether qualified immunity attaches, the focus is on the state of the law as it existed when the defendant took his challenged action. See, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987).

I. Fourteenth Amendment Procedural Due Process Claim

Mineer's claim under 42 U.S.C. § 1983 that Judge Call's conduct was violative of the Due Process Clause of the Fourteenth Amendment is dependent upon two conditions: 1) that he had a property right to continued employment and 2) that its deprivation was without due process of law.

A. *Property Right*

For reasons set forth above we conclude that on January 8, 1990, Mineer had two more years to serve on a four year term of employment and that his expectation of continued employment was a property right within the meaning of the Fourteenth Amendment.

Call raises several arguments to support the proposition that on January 8, 1990, it was not clearly established that Mineer's term did not terminate as a matter of law on that date.

One argument is based upon an opinion by the state attorney general. OAG 78-432 supports the general proposition that a fiscal court may not enter into contracts which extend beyond its own term. The opinion

clearly states, however, that this is not an absolute principle: "there is one basic exception to this general principle.... It is that if a particular statute conferring the power to contract clearly authorizes the fiscal court to make a contract extending beyond its own term, the statute would govern ...." OAG 78-432. We find that § 179.020 clearly allows the fiscal court to authorize four year terms of employment for county road supervisors.

The county attorney's stated opinion at the August 14, 1989 meeting of the Fiscal Court was based upon OAG 78-432. There are circumstances in which reliance on the advice of counsel may support a claim of qualified immunity. See, e.g., *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir. 1990) ("reliance on advice of counsel in certain circumstances rises to the level of extraordinary circumstances"). In this case, Judge Call cannot reasonably claim that he relied on the county attorney's opinion because he was not in office when the county attorney expressed his opinion nor is there anything in the record to suggest reliance.

Call's primary argument is based upon *Christian v. Belcher*, wherein another panel of this court, while affirming the district court's grant of summary judgment, stated:

> Moreover, as noted earlier, the district court expressly held that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration, and that '[a]fter Belcher was elected, [Christian] had to be reappointed to the job of [FPA].' Since we have found no Kentucky authority to the contrary, we

> defer to the experienced district judge's interpretation of the law of the state in which he sits.

Christian, 888 F.2d at 414-15.

This language however, has no application to a county road supervisor because § 179.020(7) provides an exception to the general principle that all terms expire automatically at the end of each executive administration. An appointment to a four year term necessarily extends beyond the executive administration in existence at the time of the appointment.

We, therefore, conclude that Mineer's property right in his four year term of employment was clearly established. All one had to do to reach this conclusion was to read the applicable statutes.

B. *The Process Due*

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), and its progeny define the pretermination process which is due. The Kentucky statute provides adequate process to satisfy the Fourteenth Amendment if followed. Here there was no pretense to follow the statutory procedures for terminating Mineer. Judge Call cannot claim qualified immunity because he totally disregarded clearly established procedures set forth by statute.

II. First Amendment Claim

Whatever the law may have been with respect to patronage hiring at the time Judge Call took the challenged action, there is no authority for the proposition that

political factors justify a decision to terminate an employee during the course of that employee's statutorily defined term of employment.

CONCLUSION

The District court's denial of the magistrates' motion for summary judgment on the Fourteenth Amendment due process issue is REVERSED.

The district court's denial of the county judge/executive's motion for summary judgment on the qualified immunity issue should be AFFIRMED.

No. 92-5368

Mineer v. Fleming County, et al.

RALPH B. GUY, JR., concurring in part and dissenting In part. I concur in that portion of the court's opinion which grants qualified immunity to the magistrates with respect to the Fourteenth Amendment procedural due process claim and affirms the trial court's grant of qualified immunity to the magistrates with respect to the First Amendment claim. I dissent on the qualified immunity issue as it relates to the county executive. I would grant qualified immunity to him on both the Fourteenth and First Amendment claims.

I.

To prove a violation of procedural due process, a plaintiff must demonstrate that he was deprived of a constitutionally protected liberty or property interest and that federal due process requirements were disregarded. *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1067 (6th Cir. 1984). An employee may demonstrate a protected property interest in continued employment by showing an express or implied state law basis for that interest. *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976). In at least one instance, the Supreme Court has held that a non-tenured state employee may prove such an interest by showing that the policies and practices of the employer Justified his legitimate claim of entitlement to continued employment. *Perry v. Sinderman*, 408 U.S. 593, 602-03 (1972). Thus, the first question in this case is whether a reason-

able official in Call's position could have believed that Mineer did not have a protectible property interest in his employment.

In order to resolve this issue, it is important to determine whether Mineer actually had an ongoing employment contract or whether his term of office expired with that of the outgoing fiscal court and county executive. If Mineer had a clear right to his position as road supervisor for four years beginning on January 8, 1988, then Call's treatment of Mineer could be actionable. If, as Call alleges, Mineer's term of office expired contemporaneously with that of the administration that hired him, Mineer had no clearly established property interest in his further employment,[1] and qualified immunity would shield Call from Mineer's procedural due process claim.

The resolution of this issue turns on the proper construction of Kentucky law. In *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1988), this court concluded that under Kentucky law the terms of all county employees expire automatically at the end of each executive administration. *Id.* at 414. Mineer does not respond directly to *Christian*'s conclusion in his brief; rather, he

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[1] For qualified immunity purposes, Call need only demonstrate that Kentucky law remained unclear regarding the terms of county road supervisors at the time of Mineer's dismissal. If reasonable county officials could disagree on this issue, immunity should attach. *Guercio v. Brody*, 911 F.2d 1179, 1185 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1681 (1991).

contends that the fiscal court which appointed him to a four-year term did so in furtherance of the plain meaning of Kentucky law. Citing Kentucky Revised Statutes Annotated § 179.020(7), which provides that the term of office of a county road supervisor will be either two or four years at the discretion of the fiscal court, Mineer argues that the fiscal court simply followed its statutory mandate when it appointed him to a four-year term retroactive to January 8, 1988. Thus, Mineer's contention by implication is that the *Christian* conclusion applies only where no specific term of office exists. Under Mineer's construction of Kentucky law, then, only non-civil service employees appointed without a specific term of office are subject to the *Christian* rule that employees' terms expire at the conclusion of an administration's term in office.

I find Mineer's reading of the statute unpersuasive. The conclusion of this court in *Christian* that the terms of non-civil service employees expire contemporaneously with that of the outgoing administration remains the most commonsensical reading of the applicable Kentucky law. *See* OAG 82-63 (absent a merit system, county employees — including the county road supervisor — under a previous administration automatically lose their jobs at the beginning of the new administration); OAG 82-22 (present fiscal court may not bind fiscal court coming into office in January 1982, with a contract for a county road supervisor; appointee could only fill out the remainder of the term ending on the second Tuesday of January 1982). Kentucky Revised

Statutes Annotated § 179.020(7) has much less relevance than Mineer attempts to give it. The statute gives the county executive the power to employ a county road engineer or supervisor with the consent of the fiscal court. *See* OAG 82-142. Both the county executive and the fiscal court magistrates serve four-year terms. Ky. Rev. Stat. Ann. § 67.050 (magistrates); Ky. Rev. Stat. Ann. § 67.700 (county executive). Thus, the statute serves only to give the county executive and the magistrates the flexibility to make either one or two supervisor appointments during their terms. The fiscal court can consent to the county executive's selection of a road supervisor for a two-year appointment, allowing the fiscal court and the county executive the opportunity to re-think their decision in the middle of their four-year terms, or they can select a road supervisor for their entire terms.

A coherent reading of the entire statute compels the conclusion that a road supervisor cannot serve a two-year term and then receive a four-year appointment, as was attempted by the incumbents in this case. Under section 179.020(7), a county road supervisor's period of employment begins with the second Tuesday in January of an even-numbered year. Importantly, beginning with the November 1977 election, county executives' terms of office began on the first Monday in January of the following year. *See* Ky. Rev. Stat. Ann. § 67.700. Thus, as four-year officeholders, county executives like Call would necessarily begin their terms on even-numbered years. The fact that the terms of county executives

and road supervisors parallel each other is significant, for it suggests that section 179.020(7) allows a road supervisor to serve consecutive two-year terms or one four-year term. *See* OAG 82-22 (incoming county executive, with consent of fiscal court, must appoint a county road supervisor whose term will begin the second Tuesday of January 1982, and will end as of the second Tuesday of 1984, unless another two-year term is desired; otherwise, the road supervisor's term would end on the second Tuesday in January of 1986).

To read the statute otherwise would allow the absurdity that has developed in this case — lame duck magistrates and county executives could appoint officers to terms of office which would bind succeeding popularly-elected administrations. Such a thwarting of the majority will is not commanded by Kentucky law. Mineer did not have a valid contract which extended his term in office beyond January 1990. Thus, Call acted reasonably in determining that it was lawful to conclude that Mineer did not have a cognizable property interest, and he is therefore entitled to qualified immunity.

The district court, relying on *Christian*, found a material issue of fact remained as to whether Mineer had an expectation of continued employment based upon the fact that all other county employees were allowed to maintain their jobs despite the change in administration. *See Christian*, 888 F.2d at 417 (finding a genuine issue as to whether plaintiff had a legitimate claim of entitlement to continued employment when "during [the applicable] time period [plaintiff] was the

only county employee not to be reappointed to his job upon a change in administration"). This conclusion is relevant to the merits of Mineer's underlying procedural due process claim. But whether Mineer ultimately had a protectible property interest matters not to the question of whether Call acted reasonably in concluding that Mineer did not have a protectible property interest.

I do not focus, as did the district court, on whether Call reasonably should have known of Mineer's right to notice and a hearing. Framing the issue in that way implicitly decides that Mineer did in fact have a protectible property interest in his employment which required notice and a hearing. Having found that Call reasonably concluded that Mineer did not have a protectible property interest, I would not reach the question of notice and hearing.

II.

Having concluded that Mineer did not have a valid contract which extended beyond January 1990, I next consider whether Call's politically motivated decision not to rehire Mineer violated clearly established First Amendment rights of Mineer. When considering politically motivated employment decisions, we normally do not distinguish between dismissals and decisions not to rehire. *See id.* at 416 (treating termination and failure to rehire as indistinguishable for First Amendment purposes). Thus, Call correctly characterizes this as a "failure to rehire"/constructive discharge case.

Call asserts that at the time of Mineer's dismissal in early 1990 the law was insufficiently developed, thereby entitling Call to qualified immunity because he acted in an objectively reasonable manner. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986). I agree. In January 1990, First Amendment law did not clearly establish that a county executive could not refuse to rehire county road supervisors for politically motivated reasons.

In early 1990, the relevant case law on politically motivated personnel decisions included *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989); and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). Plaintiff relies particularly on *Elrod*, *Branti*, and *Christian* to support his contention that the law clearly establishes that county road supervisors may not be dismissed from office for political reasons.

The Supreme Court first considered politically motivated personnel decisions in *Elrod*. A plurality of the Court concluded that a governmental unit violated the First Amendment when it installed a traditional patronage system of government employment. The plurality noted, however, that government has a vital interest in ensuring that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration." *Elrod*, 427 U.S. at 367. Thus, confidential employees in policymaking positions could be dismissed for political reasons. *Id.* at 372. Justice Stewart's limiting concurrence, which provided the critical fifth vote in *Elrod*, held that a

"nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring).

In an affirmation of *Elrod*, the Court in *Branti* clarified the latitude government officials enjoy in making personnel decisions. Importantly for our purposes, the Court noted that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered." *Branti*, 445 U.S. at 518 (quoting *Elrod*, 427 U.S. at 367). It then reformulated the inquiry by abandoning the labels "policymaker" or "confidential employee" in favor of asking "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Then, the Court held that the continued employment of an assistant public defender could not be conditioned on political affiliation. *Id.* at 519.

At the time of Mineer's dismissal, the Sixth Circuit's contribution to this area of the law included three cases which discussed the propriety of political firings and hirings. In *Balogh*, this court held that a trial judge bailiff was a "confidential employee" whose discharge, allegedly because he supported the judge's opponent in an earlier judicial election, did not violate the First Amendment. The court emphasized that as a judicial aide the bailiff handled sensitive communications, acted as the Judge's bodyguard, and learned the outcome of

cases prior to the publication of those decisions. The function of the job, then, subjected the bailiff to politically-motivated discharge.

In *Christian v. Belcher*, a former county flood plain administrator and building inspector brought an action against the county executive and fiscal court magistrates arising out of their failure to rehire him after the election of a new county executive. The district court granted summary judgment to all defendants, and this court remanded the case for further proceedings based on our conclusion that genuine issues of material fact existed as to whether the former administrator was dismissed for political reasons and whether party affiliation was an appropriate requirement for his position. 888 F.2d at 415-16. In *Belcher*, the court addressed the merits of whether the former administrator's dismissal had been proper. The issue of qualified immunity was never considered.

In summarizing the state of the law on the issue of politically motivated personnel decisions, this court in a later case characterized the law as "unsettled." In *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992). *Cagle* is directly relevant to the resolution of Call's qualified immunity issue. In *Cagle*, we reversed a district court's denial of summary judgment to a sheriff who had failed to rehire former deputies allegedly due to their election support of an opponent. Concluding that "any sheriff of reasonable competence in [defendant]'s position, measured objectively, would [not] have clearly understood that he was under an affirmative duty to have refrained

from refusing to reappoint the deputies in August and September, 1988[,]" *id.*, at 1349, this court found that the sheriff was entitled to qualified immunity.

These cases support Call's contention that he is entitled to qualified immunity on Mineer's First Amendment claim. In addition to the cases already cited, which constituted the law at the time of Mineer's dismissal, this court in recent years has held that a wide variety of public officials do not enjoy the right to be free from patronage dismissal. *See, e.g., Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1990) (city prosecutor); and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney). Whatever the ultimate merits of Mineer's claim, it cannot be said that he had a clearly established right as a county road supervisor to be free from a politically motivated dismissal.[2]

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[2] If it *were* clearly established that political considerations were not an appropriate job requirement for the position of county road supervisor, then the only jury question, *in this case*, would be whether the defendant's dismissal of plaintiff was motivated solely by politics. Qualified immunity is not a jury issue.

APPENDIX B

93-6046

UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT COURT

FILED SEPT. 3 1993
LEONARD GREEN, Clerk
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

In Re: JEWELL CALL, individually and in his official capacity as Fleming Couny Judge/Executive	))))	**ORDER**

Petitioner

BEFORE: GUY and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

The petitioner seeks a writ of mandamus directing the district court to enforce this court's mandate by dismissing the complaint with prejudice. The district court judge has indicated that he does not intend to respond.

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* The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

This petition arises following our opinion in *Mineer v. Call,* Sixth Circuit No. 92-5368 (May 4, 1993) (unpublished). In that case, the defendants appealed the district court's denial of qualified immunity. The defendants included six fiscal court magistrates and the petitioner, a county judge/executive. Following the issuance of this court's mandate, the district court dismissed the six fiscal court magistrates on grounds of qualified immunity, but did not dismiss the petitioner. The district court judge based his decision on the *Mineer* opinion.

The opening paragraph of our prior opinion stated that Judge Churchill delivered the opinion of the court and that Judge Guy delivered a separate opinion, concurring in part and dissenting in part, in which Judge Ryan concurred. Judge Churchill's opinion concluded that the denial of summary judgement was reversed as to the six magistrates, but affirmed as to the petitioner. However, Judge Guy's opinion dissented as to the petitioner and stated that he would grant the petitioner qualified immunity. Judge Ryan concurred in that opinion, and that concurrence effectively makes Judge Guy's opinion the majority opinion as to the petitioner. Therefore, Judge Churchill's opinion expresses the majority result with respect to magistrates, but Judge Guy's opinion, even though written as a dissent, states this court's conclusions with respect to the petitioner. this clarification should eliminate any confusion arising from the prior opinion.

It therefore is ORDERED that the district court take all appropriate steps to enforce our mandate as stated above. In view of this clarification, it is ORDERED that the petition for a writ of mandamus is dismissed.

ENTERED BY ORDER OF THIS COURT

/s/ Leonard Green, Clerk

A TRUE COPY

Attest: Leonard Green, Clerk

By: /s/ Chris Lawhorn, Deputy Clerk.

APPENDIX C

Eastern District of Kentucky
Filed: Mar 4 1992
At Lexington
Leslie G. Whitmer, Clerk
U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-4

WILLIAM MINEER, PLAINTIFF

V. **MEMORANDUM OPINION**

FLEMING COUNTY, ET. AL., DEFENDANT

* * * * *

I. INTRODUCTION

This matter is before the court on the Motion of the Defendants for Summary Judgment. The Plaintiff has filed a Reply and the Defendants have responded to that Reply and the matter is therefore fully briefed and ripe for review by the Court.

II. FACTUAL BACKGROUND

Plaintiff William Mineer was formerly the Fleming County (Kentucky) Road Supervisor. The name Defendants are as follows: Fleming County; Fleming County Fiscal Court; Jewell Call, Fleming County Judge/Executive; and Fleming County Magistrates Gary C.

Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson and L.C. Cord.

In early 1990, Mineer lost his position as road supervisor when a new Fiscal Court, composed of the named Magistrates, voted not to ratify his appointment by the former Fiscal Court.

III. TYPE OF ACTION

Mineer brings this action pursuant to 42 U.S.C. §§ 1983, 1985 and 1988, alleging that the Fleming County Fiscal Court and Judge Executive acted in violation of his First, Fifth and Fourteenth Amendment rights under the United States Constitution in discharging him from his office. He alleges that his removal from office was politically motivated punishment for the exercise of his constitutional rights.

Mineer contends that his constitutional right of due process was violated by the Defendants' failure to afford him notice and a hearing prior to his dismissal. He also alleges claims under KRS 179.020 and KRS 179.060 and a wrongful discharge cause of action under Kentucky common law.

IV. UNDISPUTED FACTS

In 1978, Mineer was recommended for the post of Fleming County Road Supervisor by then-Fleming County Judge/Executive Bill Owens ("Owens"). In July of 1978, Mineer's appointment was ratified by the Fiscal Court and he assumed the post for a term to expire in January of 1982. In January of 1982, Owens again

forwarded Mineer's name to the Fiscal Court for approval as county road supervisor and the Fiscal Court ratified this appointment for a term to expire in January of 1986.

In January of 1986, Owens again requested the Fiscal Court to ratify Mineer as road supervisor, however, the magistrates voted 5-1 against his reappointment. Mineer continued to hold the position as road supervisor and another vote was taken on his nomination in February of 1986. The tally again resulted in a 5 to 1 vote against his reappointment. Mineer continued to work until September of 1986 when another ballot was taken by the Fiscal Court resulting in a tie vote of 3-3. Owens broke the tie and Mineer was reappointed for a two year term which retroactively began in January of 1986, expiring in January of 1988.

Mineer continued to work as road supervisor after January 1988, despite Owens' failure to submit his name to the Fiscal Court for approval. In May of 1989, Owens lost the primary election for County Judge/Executive to current Fleming County Judge/Executive Jewell Call ("Call"). While still in office but after losing the primary, Owens resubmitted Mineer's name to the Fiscal Court for the post of road supervisor. Mineer was reappointed to a four year term, retroactively beginning in January of 1988 and extending to January of 1992.[1]

[1] Two of the magistrates on the Fiscal Court who voted to approve the appointment, Ernie Reeves and Charles Jolly, had lost their primary elections and consequently had terms of office that expired in January of 1990. Therefore, the term of office they voted to approve for Mineer exceeded their own.

In September of 1989, Mineer announced he would run as a write-in candidate for County Judge/Executive and took a leave of absence from his road supervisor post to do so. Thereafter, the Fleming County Attorney requested an opinion from the Kentucky Attorney General's Office as to whether Mineer could run for elective office while on a leave of absence from his appointed post. The Attorney General's Office responded that a county road supervisor would have to resign from office in order to run for elective office.[2]

In November of 1989, Call was elected County/ Judge Executive. He took office in January of 1990, as did a newly-elected Fiscal Court. In an action taken January 8, 1990, the Fleming County Fiscal Court voted not to ratify the action of the former Fiscal Court which appointed Mineer to a four year term as County Road Supervisor, effectively terminating his employment.

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants advance four arguments in support of the Motion for Summary Judgment. Initially

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[2] The letter is signed by Nathan Goldman, Assistant Attorney General and is dated October 19, 1989. While Mr. Goldman writes that the letter "does not represent a formal legal opinion" he does state that on the basis of KRS 179.460, "it would appear to us that even though the county road engineer/foreman has taken a personal leave of absence, he is still prohibited from running for office. He would have to resign as county road engineer/foreman before he could run for county office." (Exh. 2, Mem. in Supp. of Mot. for Summ. J.).

they contend that Mineer had no constitutional right to continued employment beyond the tenure of the Fiscal Court who ratified his appointment, which terminated in January of 1990. They argue that as a matter of Kentucky law, the tenure of county employees cannot extend beyond the tenure of the members of the Fiscal Court which approves their appointments, citing KRS 67.710(7) and *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

Secondly, they argue that the dismissal of Mineer was not improper, even if done for political purposes, relying on *Elrod v. Burns*, 427 U.S. 347 (1978) and *Christian v. Belcher, supra*. Defendants further contend that Mineer's job performance was unsatisfactory and had been for a number of years.

Third, the Defendants contend they are entitled to qualified immunity for their actions in dismissing Mineer because they acted in good faith and without malicious intent to deprive Mineer of his constitutional rights. They argue that at the time the Fiscal Court acted Mineer had no expectation of continued employment because the former court did not have authority to appoint him for a term which outlasted its own.

Next, the Magistrates argue that they are without authority to actually nominate or appoint employees and therefore are incapable of misusing that power within the context of 42 U.S.C. § 1983, citing *Christian v. Belcher, supra*. They contend that under KRS 67.710(7), it is the County Judge/Executive who has the

power to appoint the County Road Supervisor and therefore they, as Magistrates without such authority, should be entitled to official immunity and granted summary judgment.

Finally, the Defendants argue that public policy and tradition support allowing public officials to make employment decisions on the basis of party affiliation. The Defendants argue that despite the Supreme Court's holding in *Rutan v. Republican Party of Illinois*, 58 USLW 4872 (June 19, 1990), they should have the authority to terminate employees because of political differences.

In his response, the Plaintiff proposes a contrary interpretation of statutory and case law. He argues that the Defendants incorrectly interpret KRS 67.710(7) and that under the First Amendment he had a right to free speech without fear of reprisal. Mineer further argues that *Elrod v. Burns, supra*, is inapplicable to this situation because the position of Road Supervisor is not a policymaking one.

Mineer argues that the Defendants are not entitled to qualified immunity because their actions were not undertaken in good faith. He contends that the law against terminating employees for political reasons was firmly established at the time the Defendants terminated his employment. Further, Mineer argues that the Magistrates do have power to appoint county employees.

In their Reply, Defendants raise several new issues. They contend that Plaintiff has no property inter-

est in his employment, and therefore only his First Amendment claim remains. Defendants argue that the state cause of action for breach of contract precludes the assertion of a Section 1983 claim. They also argue that Mineer's Due Process rights were not infringed because he knew he had a right to a hearing but failed to ask for one after his employment was terminated.

Additionally, the Magistrate Defendants reiterate their defense of qualified immunity, arguing that even where there has been a violation of a clearly established right, it must be determined whether a reasonable official could reasonably have believed the action taken was lawful. Defendants contend that under prevailing statutory and case law, they had a reasonable basis for believing that Mineer's four year appointment was improper. They maintain that they are entitled to qualified immunity in their individual capacities because political considerations are appropriate in employment decisions involving policymaking personnel.

VI. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court must consider all pleadings, depositions, affidavits, and admissions on file and draw reasonable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see Smith v.*

Hudson, 600 F.2d 60 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

Once the movant shows that there is an absence of evidence to support the nonmoving party's case, the opposing party has the burden of coming forward with evidence raising the triable issue of fact. *Celotex Corp.*, 477 U.S. at 323. To sustain this burden, the opposing party may not rest on the mere allegations of his pleadings. Instead, it must set forth specific facts showing that there is a genuine issue for trial. *Potter's Med. Center v. City Hosp. Ass'n.*, 800 F.2d 1129 (6th Cir. 1986).

Ultimately, the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co.*, 879 F. 2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

Applying these standards, the Court determines that the Defendants are entitled to partial summary judgment.

VII. DISCUSSION

A. Claims against the Magistrates

1. First Amendment Claims

By reference to the factually similar case of *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989), many of the issues raised in this action may be decided. In *Christian*,

the former-Harlan County (Kentucky) Flood Plain Administrator and Building Inspector ("FPA") brought suit against the Harlan County Fiscal Court and the County Judge/Executive alleging he had been terminated as FPA solely for political purposes and as punishment for his exercise of his First and Fourteenth Amendment rights. He also alleged the defendants had denied him Due Process in failing to grant his request for a post-termination hearing.

KRS 67.710 provides, in relevant part, as follows:

> The county judge/executive shall be the chief executive of the county and shall have all the powers and perform all the duties of an executive and administrative nature vested in, or imposed upon, the county or its fiscal court by law... and such additional powers as granted by the fiscal court... His responsibilities shall include, but are not limited to, the following:
>
> (7) Exercise with approval of the fiscal court the authority to appoint, supervise, suspend, and remove county personnel (unless otherwise provided by state law);

In interpreting this statute the *Christian* court held,

> [T]he plain language of the statute indicates that the Fiscal Court has not general authority to nominate or appoint county employees. The statute grants the judge executive the "authority to appoint, supervise, suspend, and remove county personnel," subject only to the "approval of the fiscal court." This language clearly contemplates that, in general, only the Judge Executive may nominate person for county employment, and that the Fiscal

> Court must either accept or reject those nominations.

Christian at 414.

In sum, the Sixth Circuit held that summary judgment in favor of the defendant fiscal court was proper because under Kentucky law, the Magistrates did not have the authority to reappoint the plaintiff to county employment.

In this action, the Plaintiff in oral argument pointed out the parenthetical phrase in KRS 67.710(7), which allows the judge/executive to exercise his authority with the approval of the fiscal court "unless otherwise provided by state law." Mineer contended that this phrase distinguished his case from *Christian*. Mineer alleges that KRS 179.020(7) sets the term of office for the road supervisor at a two or four year term, within the discretion of the fiscal court, and thus fits within the KRS 67.710(7) exception.

This statutory grant of discretion to the fiscal court in setting the term of office at either two or four years does not imply that the fiscal court has any greater authority in the employment of the road supervisor than in the employment of any other county employee. In fact, KRS 179.020(1) and (2) expressly state that the judge/executive shall employ the road supervisor "with the consent of the fiscal court." Therefore, the Court is not persuaded that this action is distinguishable from *Christian*.

Plaintiff further contended at oral argument that

his employment was *terminated* from employment, unlike the situation in *Christian* where the plaintiff's term of office expired and the fiscal court failed to rehire him. However, the *Christian* court expressly stated that "decisions not to 'reappoint' state employees are treated the same as job 'terminations' in this context," *Christian* at 415, and therefore, that argument has no merit.

It is well settled that Section 1983 was enacted to protect individuals against the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," *Monroe v. Pape*, 365 U.S. 167, 184 (1961). As the foregoing statutory and case law indicates, the Fleming County Magistrates had no authority to appoint or reappoint county employees such as Mineer, therefore the Court finds that summary judgment in favor of the Magistrate Defendants on his First Amendment claim is appropriate. As this issue has been decided in their favor, it is unnecessary to address the Magistrate Defendants' argument that they are entitled to qualified immunity on the First Amendment claim.

2. *State Law Wrongful Discharge Claims*

Although neither party has addressed this issue in the pleadings, it is clear from the foregoing discussion that Kentucky law does not provide Magistrates with the power to independently hire or discharge a county employee. Therefore there is no authority with which to hold the Magistrates liable for wrongful discharge under the common law of Kentucky.

3. Due Process Claims

To prove a violation of procedural due process, the Plaintiff must demonstrate that he was deprived of a constitutionally protected liberty or property interest and that federal due process requirements were disregarded. *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1067 (6th Cir. 1984). An employee may demonstrate a protected property interest in continued employment by showing an express or implied state law basis for that interest. *Bishop v. Wood*, 426 U.S. 341 (1976). In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Supreme Court held that a nontenured state employee may prove such an interest by showing that the policies and practices of the employer justified his legitimate claim of entitlement to continued employment.

Herein, Mineer alleges that Defendants violated his constitutional rights by failing to provide notice and a hearing required by KRS 179.060 "in that no charges were brought against him and no notice or opportunity for hearing was afforded him." (Compl. at 4).

Defendants contend that Mineer had no expectation of continued employment because his term of office expired contemporaneously with that of the administration that hired him. They support this argument by relying on the following discussion in *Christian*:

> [T]he district court expressly held that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration,... Since we have found no Ken-

> tucky authority to the contrary, we defer to the experienced district judge's interpretation of the law of the state in which he sits.

Christian at 414-415.

Mineer responds that he had been rehired for a four year term which was to extend to January of 1992, and therefore he had an expectation of continued employment.

There is evidence in the record which supports the Defendants' position. For example, in the Fleming County Fiscal Court Personnel Policies, Hiring Guidelines section, the following statement is made: "Both the date of employment and service date are established on the first date the employee reports for work; however, the former remains constant and the latter may be adjusted from time to time." Further, in the Administrative Code for the Operation of Fleming County, Section 510.2, it states that the "county road supervisor shall be appointed by the judge/executive with the consent of fiscal court and shall serve *at the pleasure of the court.*" (emphasis added). There is no proof in the record that Mineer had possession or knowledge of these documents.

In *Christian*, the Sixth Circuit reversed the district court's grant of summary judgment on the plaintiff's due process claims, despite the language in the same case which implies that an employee's term of office expires contemporaneously with the fiscal court which appointed him.

The *Christian* court found that the general policy and practice in Harlan County was to maintain employees upon a change in administrations and that the plaintiff was the only employee from the previous administration who was not reappointed. Based upon this evidence, the court concluded that the plaintiff had "raised a genuine issue of material fact concerning whether he had a legitimate claim of entitlement to continued employment such that defendants' failure to grant him a hearing violated the due process clause of the fourteenth amendment." *Christian* at 417.

Pursuant to *Christian*, there is a material issue of fact raised as to whether Mineer had an expectation of continued employment. In Call's deposition, for example, he admits that Mineer was fired even though "[t]he rest of the boys I did hire all of them." (Call Dep. at 19-20) This statement can be reasonably interpreted to show that other employees were allowed to maintain their jobs despite the change in administration, and Mineer may therefore have had an expectation in continued employment.

Further, in the case at bar, the evidence proferred by the Plaintiff is that he did not receive a hearing despite the provision in the Kentucky statutes mandating notice and a hearing upon removal of the Road Supervisor from office.

The Magistrate Defendants claim they are entitled to qualified immunity. Whether qualified immunity applies is purely a legal issue to be determined by the court. *See Garvie v. Jackson*, 845 F.2d 647 (6th Cir.

1988). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court established that qualified immunity protects the actions of government officials, unless the conduct violates "clearly established statutory or constitutional rights." The standard was further defined in the case of *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), wherein the Court stated that the issue of whether qualified immunity will protect an official from personal liability for an allegedly unlawful action "generally turns on the 'objective legal reasonableness' of the action, assessed in the light of the legal rules that were 'clearly established' at the time it was taken." (citations omitted). In determining whether the rules were "clearly established" at the time of the alleged violation, we look to "federal constitutional, statutory or case law existing at the time." *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988).

Herein, KRS 179.060 expressly states that the "county judge/executive may remove the county (road supervisor)... at any time for incompetency, malfeasance or misfeasance in office upon written charges after a hearing of which ten (10) days' notice shall be given..."

There is no evidence presented in the record as to the procedures normally implemented in Fleming County to serve notice upon and arrange hearings at the request of terminated employees. However, the Fleming County documents referred to above do establish that the road supervisor is to serve "at the pleasure of the (fiscal) court."

The Court finds that a jury question exists as to whether the Defendant Magistrates should reasonably have known of Mineer's right to notice and a hearing. In the case of *Poe v. Haydon, supra*, the Sixth Circuit stated:

> [S]ummary judgment would be not appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe at 426.

Therefore, a grant of summary judgment to the Defendants on this claim would be inappropriate.

B. Claims against the County Judge/Executive

In support of the Motion for Summary Judgment, the County Judge/Executive argues that it was not improper to terminate Mineer's employment for purely political reasons. Call relies on a line of Supreme Court cases which recognize that an employer may consider an individual's political affiliations in making certain employment decisions.

However, in *Elrod v. Burns*, 427 U.S. 347, 375 (1976), the Court held that a government employer may make

politically motivated personnel decisions only when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved." In formulating this opinion, the Court drew a distinction between "policymaking" and "nonpolicymaking" employees and held that only in the case of policymaking employees could party affiliation be an appropriate requirement for the effective performance of the office.

Subsequently, the Court held that unless political loyalty is "essential to the discharge of the employee's governmental responsibilities," then dismissal of the employee for political reasons is unconstitutional. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The Sixth Circuit interpreted these holdings, stating that "once the employee shows that he was terminated... solely because of his political expression or association, *Branti* imposes a heavy burden upon the employer to justify that action." *Christian* at 415.

Recently, in *Rutan v. Republican Party of Illinois, supra*, the Court broadened the scope of this rule to include hirings and promotions based on political considerations as well as discharges. The *Rutan* Court stated that "conditional hiring decisions based on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 58 USLW at 4876.

In *Christian*, the Sixth Circuit imposed a burden on the county judge/executive to "demonstrat[e] that political loyalty is essential to the discharge of the [employee's]

duties." *Christian* at 416. The court denied summary judgment, finding that material facts remained as to whether the employee's termination was based solely on political considerations and whether the political loyalty was an appropriate job requirement.

However, in the case *sub judice* the Defendant Call claims qualified immunity as a defense. The discussion above in section VII.A.3 sets forth the standards to be applied in determining whether qualified immunity is applicable. Without repeating those standards, the discussion below will refer to them.

The Sixth Circuit recently addressed the issue of qualified immunity in the context of a wrongful termination suit in *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991) Plaintiff Gossman, a former employee of the Louisville (Kentucky) and Jefferson County Board of Health, brought a state law and First Amendment action against her former employer alleging she had been wrongfully terminated because of statements she made to the media, the public and a court. The defendants claimed they were entitled to qualified immunity on all claims.

The Sixth Circuit affirmed the district court's denial of qualified immunity on the state law claims "[s]ince (the plaintiff's) state law claims for damages do not invoke any federal law whatsoever, qualified immunity is not an available defense." *Gossman* at 341.

As to the federal law claims, the court held that

[t]he proper inquiry is not whether the claimed

> right existed in the abstract, but whether a reasonable official would have known that the challenged conduct violated that right. Under this test, an official will be immune 'if officers of reasonable competence could disagree' on whether the conduct violated the plaintiff's rights.

Gossman at 341.

In the case at bar, Mineer alleges state law causes of action based on KRS 179.020 and 179.060 as well as a common law wrongful discharge claim. These statutes provide for the hiring, term of office and removal from office of the county road supervisor. KRS 179.060 specifically addresses the procedures to be undertaken for removal of the engineer, including serving "written charges after a hearing." These causes of action do not invoke any federal law but are claims for damages based on state law. Therefore, pursuant to *Gossman*, qualified immunity is not available to Defendant Call as a defense to Mineer's state law claims.

As to Mineer's federal law claims, Call's claim of qualified immunity requires the Court to ask whether a reasonable official would have known that terminating Mineer's employment violated his First, Fifth and Fourteenth Amendment rights. However, as is discussed above, the *Christian* court determined that the issues of whether an employee's termination was based solely on political affiliations and whether political considerations were an appropriate job requirement are matters which are jury questions and cannot be decided on a motion for summary judgment.

This conundrum is considered and solved in *Poe v. Haydon*, *supra*. Therein, the Sixth Circuit stated:

> [S]ummary judgment would be not appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe at 426.

Here, the right at issue is the right not to be fired from a job for purely political purposes when political considerations are not an appropriate factor for the performance of that job. The Court concludes that a jury issue exists as to whether Mineer had a right not to be terminated from his position as Fleming County Road Supervisor, and whether political affiliation is an appropriate consideration for the position of road supervisor.

Further, there is a material issue of fact which exists as to whether Mineer was terminated for purely political reasons. There is evidence in the record that the Fiscal Court members had declined to approve his appointed on several occasions as well as testimony in deposition that Mineer had not performed his duties as

Road Supervisor in a satisfactory manner.[3] On the contrary, there is evidence in the record from which the reasonable inference could be drawn in favor of Mineer that he was terminated solely because he contested Call's candidacy for Judge/Executive. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). For example, in his deposition, Mineer states that Call told him, "if I can get it done I'm going to let you go. And he said I don't want any hard feelings, but he said, you know, I promised your job to another guy." (Mineer Dep. at 43.)

Therefore, pursuant to the holding in *Poe*, the Defendant Call's motion for summary judgment must be denied and the Court finds that he is not entitled to qualified immunity.

VIII. CONCLUSION

For the foregoing reasons, the Court concludes that partial summary judgment in the case is appropriate. An Order consistent with this Memorandum Opinion will be issued on the same date herewith.

This 4th day of March, 1992.

/s/ Karl S. Forester, Judge

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[3] Deposition of L.C. Cord, Jr., at 21.